

1 Donald H. Nichols, MN State Bar No. 78918
2 (admitted pro hac vice)
3 Paul J. Lukas, MN State Bar No. 22084X
4 (admitted pro hac vice)
5 Tim C. Selander, MN Bar No. 0387016
6 (admitted pro hac vice)
7 NICHOLS KASTER & ANDERSON, PLLP
8 4600 IDS Center
9 80 S. 8th Street
Minneapolis, MN 55402

10 Bryan J. Schwartz, CA State Bar No. 209903
11 Matthew C. Helland, CA State Bar No. 250451
12 NICHOLS KASTER & ANDERSON, LLP
One Embarcadero Center, Ste. 720
13 San Francisco, CA 94111

14 Attorneys for Individual and Representative Plaintiffs

15 IN THE UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17 Philip Wong, Frederic Chaussy, and Leslie
18 Marie Shearn, individually, on behalf of all
19 others similarly situated, and on behalf of
20 the general public,

21 Plaintiffs,

22 vs.

23 HSBC Mortgage Corporation (USA);
24 HSBC Bank USA, N.A.; and DOES 1
25 through 50, inclusive,

26 Defendants.

27 **Case No.: 3:07-cv-2446 MMC**

28 **PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR
CONDITIONAL CERTIFICATION AND
JUDICIAL NOTICE AND PARTIAL
SUMMARY JUDGMENT**

Date: February 8, 2008

Time: 9:00 a.m.

Date originally filed: May 7, 2007

1
2 **TABLE OF CONTENTS**
3

4	I. INTRODUCTION.....	1
	A. Conditional Certification and Judicial Notice.....	1
	B. Summary Judgment on Exemption Defenses.....	1
	C. Summary Judgment on HSBC Bank's Status as "Employer".....	1
5	II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND JUDICIAL NOTICE.....	2
	A. Defendants Fail to Rebut the Overwhelming Evidence Demonstrating that Loan Officers are Sufficiently "Similarly Situated.".....	2
	1. Retail Mortgage Loan Consultants, Senior Retail Loan Consultants, and Premier Mortgage Sales Officer are "similarly situated" position.	3
	2. The alleged "differences" in comparison structures have no bearing on the "similarly situated" analysis.....	5
	3. Defendants cannot prove there is a difference in "decision makers" on the issues relevant to this motion.....	6
	4. Defendants cannot prove differences in geographic location effects the similarly situated nature of the loan officer position.....	7
	B. The Cases Cited by Defendants in Support of Their Argument Are Distinguished or Inapplicable to this Case.....	7
	C. Plaintiffs' Informal Efforts to Contact Similarly Situated Employees are Not Relevant to this Motion.....	9
10	III. SUMMARY JUDGMENT SHOULD BE GRANTED ON DEFENDANT'S ADMINISTRATIVE, HIGHLY COMPENSATED, AND RETAIL SALES AFFIRMATIVE DEFENSES.....	10
	A. Defendants' Admission That Loan Officers' Primary Duty is "Sales" is Fatal to Their "Administrative" Exemption Defense.....	10
	B. Defendants Have No Basis for the "Highly Compensated Employee" Exemption Defense.....	11
	C. As Lenders, Defendants Do Not Qualify for the Section 7(i) "Retail Sales" Defense as Matter of Law.....	12
11	IV. SUMMARY JUDGMENT SHOULD BE GRANTED ON DEFENDANT HSBC BANKS' STATUS AS A FLSA EMPLOYER.....	13
	A. HSBC Bank is Intimately Involved in Mortgage Corp's Personnel Activities.....	14
	B. HSBC Bank and HSBC Mortgage Share Offices, Employee and Other Resources.....	15
12	V. CONCLUSION.....	15

1
TABLE OF AUTHORITIES
2

3 **CASES**

<u>Agdipa v. Grant Joint Union High School Dist.</u> , 4 2007 WL 1106099 (E.D. Cal. 2007).....	7
<u>Aguirre v. SBC Comm., Inc.</u> , 2006 WL 964554 at * 6 (S.D. Tex. 2006)	8
<u>Barnett v. Washington Mutual Bank, FA, et al.</u> , 7 2004 WL 1753400, *3, (N.D. Cal.)	12
<u>Beauperthuy v. 24 Hour Fitness USA, Inc.</u> , 8 2007 WL 707475 (N.D. Cal. 2007).....	1, 7
<u>Bowoto v. Chevron Texaco Corp.</u> , 9 312 F.Supp.2d 1229, 1234-1236 (N.D. Cal. 2004)	15
<u>Briggs v. U.S.</u> , 54 Fed. Cl. 205, 207 (Fed. Cl. Ct. 2002)	8
<u>Brooks v. BellSouth Telecomm., Inc.</u> , 164 F.R.D. 561, 568 (N.D. Ala. 1995).....	8
<u>Calin Corp. v. Ace American Ins. Co.</u> , 13 2007 WL 3010570, *7 (N.D. Cal. October 12, 2007).....	3
<u>Casas v. Conseco Finance Corp.</u> , 2002 WL 507059 (D. Minn.).....	12
<u>Clausman v. Nortel Networks, Inc.</u> , 2003 WL 21314065 at *5 (S.D. Ind. 2003)	8
<u>Dalton v. Logan Mfg. Corp.</u> , 42 F.3d 1399, *2 (9 th Cir. 1994)	13
<u>Diaz v. Electronics Boutique of Am., Inc.</u> , 18 2005 WL 2654270 at * 2 (W.D.N.Y. 2005)	8
<u>EEOC v. Financial Assurance, Inc.</u> , 624 F.Supp. 686, 689-90 (W.D.Mo. 1985)	14
<u>England v. New Century Fin. Corp.</u> , 370 F.Supp.2d 504, 508 (M.D. La. 2005)	8
<u>Flores v. Lifeway Foods, Inc.</u> , 289 F. Supp. 2d 1042, 1046 (N.D. Ill. 2003).....	8
<u>Frank v. Gold'n Plump Poultry, Inc.</u> , 2007 WL 2780504, *4 (D. Minn. 2007).....	7
<u>Frank v. West</u> , 3 F.3d 1353, 1360 (10 th Cir. 1993)	14
<u>Gatto v. Mortgage Specialists of Ill., Inc.</u> , 24 442 F. Supp. 2d 529, 541-42 (N.D. Ill. 2006).....	12
<u>Gerlach v. Wells Fargo & Co.</u> , 2006 WL 824652, *2 (N.D. Cal. 2006).....	2, 8
<u>Hoffmann-La Rouche Inc. v. Sperling</u> , 493 U.S. 165, 174 (1989)	9, 10
<u>Holt v. Rite Aid Corp.</u> , 333 F. Supp. 2d 1265, 1274 (M.D. Ala. 2004).....	8

1	<u>Kalish v. High Tech Institute, Inc.</u> , 2005 WL 1073645, *4 (D. Minn. 2005)	9, 10
2	<u>Lapenna v. Upjohn Co.</u> , 110 F.R.D. 15, 21 (E.D. Pa. 1986)	3
3	<u>Leuthold v. Destination America, Inc.</u> , 224 F.R.D. 462, 466-467 (N.D. Cal. 2004)	8
4	<u>Mike v. Safeco Ins. Co.</u> , 274 F. Supp. 2d 216, 221 (D. Conn. 2003).....	8
5	<u>Mitchell v. Kentucky Finance Co.</u> , 359 U.S. 290, 291 (1959).....	12
6	<u>Morisky v. Pub. Serv. Elec. & Gas Co.</u> , 111 F. Supp. 2d 493, 497-98 (D. N.J. 2002).....	8
7	<u>Morris v. Covan World Wide Moving, Inc.</u> , 144 F.3d 377, 380 (5th Cir.1998).....	13
8	<u>Nerland v. Caribou Coffee Co.</u> , No.05-1847 (PJL/JJG), *17-18 (April 6, 2007, D. Minn.).....	6
9	<u>Partida v. American Student Loan Corp.</u> , No. 07-0674 (PHX/DGC), slip op. at *5 (D. AZ, Jan. 18, 2008)	12
10	<u>Pontius v. Delta Financial Corp.</u> , 2007 WL 1496692, *4-6 (March 20, 2007, W.D. Pa.)	12
11	<u>Prentice v. Fund for Public Interest Research, Inc.</u> , 2007 WL 2729187 (N.D. Cal. 2007).....	7
12	<u>Rees v. Souza's Milk Transp., Co.</u> , 2006 WL 738997, *3 (E.D. Cal. 2006)	2
13	<u>Saunders v. Ace Mortgage Funding, Inc.</u> , 2007 WL 1190985, *6 (April 16, 2007, D. Minn.).....	12
14	<u>Shapero v. Kentucky Bar Ass'n</u> , 486 U.S. 466, 472 (1988)	9
15	<u>Sheffield v. Orius Corp.</u> , 211 F.R.D. 411, 412 (D. Or. 2002)	8
16	<u>Smith</u> , 590 F.Supp. at 1208; Opp. at p. 22	16
17	<u>Stanfield v. First NLC</u> , No. 06-3892 (SBA/JL), slip op. at *5 (Oct. 30, 2006, N.D. Cal.)	8, 9, 10
18	<u>U.S. v. Mass. Indus. Finance Agency</u> , 162 F.R.D. 410, 412 (D. Mass. 1995)	3
19	<u>U.S. v. Taylor</u> , 166 F.R.D. 356, 361 (M.D. N.C. 1996).....	3
20	STATUTES	
21	29 C.F.R. 541.203(b)	11
22	29 C.F.R. 541.500.....	11
23	29 C.F.R. 541.601(a).....	11
24	OTHER AUTHORITIES	
25	<u>Federal Civil Procedure Before Trial</u> , 11:1517 .1 (Rutter Group Practice Guide 2006)	3
26		
27		
28		

1 **I. INTRODUCTION**

2 **A. Conditional Certification and Judicial Notice.**¹ Defendants seek to
 3 apply a standard for conditional certification that does not exist, clinging to “differences”
 4 between loan officers so remote, no two employees could ever be considered “similarly
 5 situated.” Unfortunately for Defendant, Plaintiffs are required only to make a “minimal
 6 showing that the members of the proposed class are ‘similarly situated.’” **Beauperthuy**
 7
 8 **v. 24 Hour Fitness USA, Inc.**, 2007 WL 707475 (N.D. Cal. 2007). Defendants’
 9 admissions and the other evidence produced by Plaintiffs, showing that the loan officers
 10 are in the same job, performing the same duties, and uniformly denied overtime
 11 compensation as a result of Defendants’ decision to misclassify the entire group as
 12 “exempt” employees, easily meet this “very light burden.” **Id.**
 13

14 **B. Summary Judgment on Exemption Defenses.**² Defendants stubbornly
 15 refuse to discuss, or even acknowledge, their concessions that: 1) Plaintiffs’ primary duty
 16 is sales, an admission eliminating the “administrative” and “highly compensated
 17 employee” exemption defenses; and 2) the fact that they are “lenders,” a fact that is fatal
 18 to their claim to the Section 7(i) retail sales exemption.
 19

20 **C. Summary Judgment on HSBC Bank’s Status as “Employer.”** The
 21 Court’s finding should be consistent with what Defendants teach their loan officers, that
 22 “they’re part of something much bigger than just the mortgage corporation,” they are part
 23 of HSBC Bank.
 24
 25
 26

27 ¹ Defendants do not contest Plaintiffs’ motion for an updated list of loan officers should Plaintiffs prevail
 28 on their motion for conditional certification and judicial notice. (Dkt. #78, p. 20.)

27 ² Defendants do not contest Plaintiffs’ motion as to the “executive” and “professional” exemption defenses.
 28 (Dkt. #78, p. 24, n.27.)

1 **II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR
2 CONDITIONAL CERTIFICATION AND JUDICIAL NOTICE.**

3 To prevail on their motion for conditional certification, Plaintiffs need only show
4 “some identifiable factual or legal nexus” that “binds together the various claims of the
5 class members,” such as being victims of a “single decision, policy, or plan.” Gerlach v.
6 Wells Fargo & Co., 2006 WL 824652, *2 (N.D. Cal. 2006); Rees v. Souza's Milk
7 Transp., Co., 2006 WL 738997, *3 (E.D. Cal. 2006). Here, Plaintiffs present
8 Defendants’ own admissions and documents, and seventeen declarations showing that the
9 proposed class of loan officers: 1) worked the same sales job; 2) performed the same
10 duties; 3) sold the same loan products, using the same tools, and following that same
11 policies and procedures as dictated through the same nationwide training programs; 4)
12 worked primarily at Defendants’ branch offices or their home offices;³ and, most
13 importantly 5) were subjected to the same unlawful “exempt” classification decision and
14 worked uncompensated overtime hours as a result. Defendants present no facts, cite no
15 cases, nor present any argument to overcome this overwhelming proof that all loan
16 officers are “similarly situated” employees under the applicable standard.
17

18 **A. Defendants Fail to Rebut the Overwhelming Evidence Demonstrating
19 that Loan Officers are Sufficiently “Similarly Situated.”**

20 In opposition to Plaintiffs’ motion, Defendants argue that: “Plaintiffs’ proposed
21 class is comprised of a diverse group of HMCU employees with varying job titles, duties,
22 geographic locations, decision makers, and compensation structures.” (Dkt. 78, p. 12.)
23 In making this argument, Defendants attempt to create a number of “differences”
24 between the class members that are directly rebutted by their own documents and
25 admissions, are irrelevant to the motion, or both.
26

27 ³ The declarations provided by Plaintiffs uniformly describe an inside sales job, while Defendants admit –
28 despite claiming the “outside sales exemption” - that they do not have sufficient information to rebut these
 facts. (Dkt. #71, pp. 7-8.)

1. Retail Mortgage Loan Consultants, Senior Retail Loan Consultants, and Premier Mortgage Sales Officer are “similarly situated” positions.

Defendants’ most blatant attempt to create differences where they do not exist is their argument that Retail Mortgage Loan Consultants (“LCs”), Senior Retail Mortgage Loan Consultants (“SLCs”), and Premier Mortgage Sales Officers (“PSOs”) are not “similarly situated” positions. In making this argument, Defendants accuse Plaintiffs of “misleading” the Court by “capriciously group[ing] these employees under one broad umbrella of ‘loan officers.’” (Dkt. #78, p. 12.) Far from “capricious,” the “grouping” of LCs, SLCs, and PSOs into one job title of “loan officers” is directly supported by the testimony of Defendants’ own Rule 30(b)(6) corporate designee⁴ and their Director of Human Resources, both of whom testified that these jobs are primarily the same. In fact, these witnesses confirm that these jobs are so similar, they have eliminated the SLC and PSO job titles, and all such employees are now simply known as “loan consultants”:

Rule 30(b)(6) Deposition of David Gates, Defendant HSBC Mortgage Corp.'s Senior Vice President – National Sales and Marketing (Ex. #3, pp. 18-19.)

Q. Okay. Now, while we're on the subject, loan officers, you said there are about 260 of them. They also have had a variety of titles over the years. Is it accurate to say that loan – the laymen's term or commonly used phrase loan officer is used by HSBC to describe people who are also known as retail mortgage lending consultants or at some point, who were also known as senior retail mortgage lending consultants?

A. Yes.

Q. Is there any other title that would have been encompassed by loan officer?

⁴ “The answers given by the person designated by the corporation in a Rule 30(b)(6) deposition are binding on the corporation.” Calin Corp. v. Ace American Ins. Co., 2007 WL 3010570, *7 (N.D. Cal. October 12, 2007) (Illston, J), citing Judges Schwarzer, Tashima and Wagstaffe, Federal Civil Procedure Before Trial, 11:1517 .1 (Rutter Group Practice Guide 2006). Deposition testimony given pursuant to Fed.R.Civ.P. 30(b)(6) is not the personal opinion of the corporate designee, but is the “corporation’s position on the topic.” See, e.g., U.S. v. Taylor, 166 F.R.D. 356, 361 (M.D. N.C. 1996) citing U.S. v. Mass. Indus. Finance Agency, 162 F.R.D. 410, 412 (D. Mass. 1995). See also Lapenna v. Upjohn Co., 110 F.R.D. 15, 21 (E.D. Pa. 1986).

1 A. No.
2 Q. Is there -- I believe I heard of somebody called a premier mortgage
3 lending consultant or a premier retail mortgage lending consultant or
something like that. Are you aware of people in that capacity?
4 A. Yes. In a prior description, you are correct.
5 Q. Okay. And those people would also be within the broad -- the
umbrella of loan officers, correct, of the 260?
6 A. Yes. We don't have that position today.
7 Q. Okay. And if I understand correctly from prior discovery, today all of
your loan officers have been consolidated into the formal position of
retail mortgage lending consultants; is that correct?
8 A. Yes.

8 * * * * *

9 Deposition of Jeanette Jennings, Defendant HSBC Bank's Senior Vice
10 President –Human Resources Group Director (Exh. #17, pp. 31-32).

11 Q. How many total -- how many employees are there in the mortgage
division?
12 A. Approximately 1600.
13 Q. How many of those are loan officers?
14 A. I would have to take an educated guess. About 275, give or take.
15 Q. And the term "loan officer" is used broadly to refer to anybody who is
or used to be known as a retail mortgage lending consultant, a senior
retail mortgage lending consultant, a premier mortgage loan
consultant, any of those types of titles? They would all fall under that
category of loan officer; is that right?
16 A. The premier no longer exists altogether, so they are just regular loan
consultants. So I would say, yes, they're all considered loan
consultants.
17 Q. Loan consultant, loan officer, these are all synonymous?
18 A. It's -- yes.

20 Even when the SLC and PSO positions existed, Defendants admit that the "job
21 description is the same for those roles,"⁵ and that "the overall crux of it, the overall core
22

23 _____
24 ⁵ A comparison of the job descriptions produced by Defendants quickly confirm these admissions. For
example, the "Summary of Position" describing each job is virtually identical:

25 Retail Mortgage Consultant: Generates and increases market share of high quality salable retail
residential mortgage loans, primarily through realtor relationships, builder and branch
relationships, while ensuring high customer service levels. (Exh. #18.)

26 Senior Retail Mortgage Consultant: Generates and increases market share of high quality salable
retail residential mortgage loans, primarily through realtor relationships and external sources,
ensuring high customer service levels. (Exh. #19.)

27 Premier Mortgage Sales Officer: Generates and increases market share of high quality salable
retail residential mortgage loans for affluent customers, primarily through realtor relationships and
external sources, ensuring high customer service levels. (Exh. #20.)

1 responsibilities would be the same, and that's what they would be evaluated on." (Exh.
 2 17, pp. 156, 158.) In light of these admissions, none of the marginal "differences"
 3 Defendants claim with respect to the duties performed in these jobs can preclude a
 4 "similarly situated" finding.⁶

5

6 **2. The alleged "differences" in compensation structures have no
 bearing on the "similarly situated" analysis.**

7 The only "compensation method" relevant here is the class-wide "exempt"
 8 classification, and the resulting failure to pay loan officers overtime compensation.
 9 Defendants do not claim that some loan officers were classified differently, or even that
 10 some were classified as "exempt" for different reasons. Rather, Defendants' witnesses
 11 admit that the loan officers are paid under the same "compensation structure." (Exh. #3,
 12 p. 112, lines 5-11; Exh. #17, p. 99, lines 3-10.) The only difference Defendants offer is
 13 the possibility that the non-commission portion of their income may be either a "salary"
 14 or a "draw," the differences in the amount of those salaries/draws, and whether the draws
 15 are "recoverable" or "forgiven."⁷ (Dkt. #78, pp. 4-6.)

16

17 These differences are entirely inconsequential in light of the lenient definition of
 18 "similarly situated" at this stage of the litigation, and the fact that all loan officers -
 19 improperly classified as "exempt" for the same reason - are "similarly situated" with
 20 respect to the only "compensation methods" relevant to this case. Indeed, even in cases

21

22

23 An example of such efforts is Defendants' claim that some loan officers enter the information required
 24 from the customer directly into the LoanQuest software program, while others write the information down
 25 on paper and enter it into the program later. (Dkt. #78, p. 2.) Without respect to the fact that this argument
 26 results in yet another admission that all loan officers are required to perform their sales jobs in the same
 27 manner (using the same tools and guidelines such as the LoanQuest loan sales software program), such
 28 meaningless differences highlight the utter lack of tangible evidence Defendants produce in their claim that
 all loan officers are not at least "similarly situated."

29

30 Defendants' also claim that PSO's are paid under a different compensation plan than LCs and SLCs.
 31 (Dkt. #78, p.4.) Without respect to the fact that the only difference identified by Defendants between the
 32 plans is the "salary" v. "draw" distinction described above, this claim is directly contrary to the testimony
 33 of Defendants' 30(b)(6) corporate designee, who testified that all loan officers "operate based on a retail
 34 mortgage consultant sales commission plan." (Exh. #3, pp. 29.)

applying the stricter second stage analysis for FLSA “decertification” the courts have rejected similar attempts by defendants to “have their cake and eat it too.”

The Court finds it disingenuous for [Defendant], on one hand to collectively and generally decide that all store managers are exempt from overtime compensation without any individualized inquiry, while on the other hand, claiming that plaintiffs cannot proceed collectively to challenge the exemption.

Nerland v. Caribou Coffee Co., No.05-1847 (PJJ/JHG), *17-18 (April 6, 2007, D. Minn.).⁸

3. Defendants cannot prove there is a difference in “decision makers” on the issues relevant to this motion.

Defendants do not claim that this classification decision was made on a branch-by-branch basis, or in any way other than as a corporate-wide decision affecting all loan officers regardless of who managed them. Instead, Defendants provide a number of hollow examples of situations in which different “decision makers” effect the loan officer job.⁹ (See, Dkt. #78, pp. 4-7)

For these “differences” to have any import, the Court would again have to require proof beyond that which is necessary even under the more stringent second stage analysis. For example, in a recent decision in which the court denied second stage decertification in an FLSA “donning and doffing” case, the court stated:

Gold'n Plump exaggerates the factual differences among employees on various shifts and in different departments. If one zooms in close enough on anything, differences will abound; even for a single employee doing a single job, the amount of time that she spends donning and doffing on Monday will differ, at least minutely, from the amount of time that she spends donning and doffing on Tuesday. But plaintiffs' claims need to be considered at a higher level of abstraction.

Frank v. Gold'n Plump Poultry, Inc., 2007 WL 2780504, *4 (D. Minn. 2007).

⁸ Attached as Exh. 25.

⁹ These include Defendants' arguments that: 1) individual managers make decisions regarding "what type of candidates they want to hire;" 2) although all loan officers receive the exact same orientation and training, the loan officers may receive additional training from their individual managers; and 3) in addition to the national sales production contests Defendants held for all loan officers nationwide, each branch manager is allowed to hold local contests. (Dkt. #78, p. 4-7.)

At the correct “level of abstraction” (the lenient first stage “similarly situated” standard”), none of the “differences” Defendants claim result from various direct managers have any impact on the fact that all loan officers are denied overtime pay as a result of a “single decision, policy, or plan.”

4. Defendants cannot prove differences in geographic location effects the similarly situated nature of the loan officer position.

Finally, Defendants’ claim that differences in “geographic location” - particularly California - result in differences among the loan officers sufficient to defeat a “similarly situated” finding. Again, however, Defendants provide no specific, tangible examples of relevant differences driven by geography.¹⁰ Instead, Defendants admit that loan officers perform the same “core responsibilities,”¹¹ are subject to the same “core personnel policies,”¹² and are paid under the same “compensation structure,”¹³ regardless of geography.

B. The Cases Cited by Defendants in Support of Their Arguments Are Distinguished, or Inapplicable to this Case.

Tellingly, Defendants cite no cases from this district or circuit directly rebutting the overwhelming authority Plaintiffs cite from the California Federal District Courts.¹⁴ Instead, Defendants cite four categories of cases, easily distinguishable from this case. First, despite admitting that the “first-tier notice standard is the appropriate standard to

¹⁰ With respect to California, for example, Defendants point out that they maintain fewer loan officers in California than some other locations, and that because HSBC is “less recognized” in California, loan officers there “must work harder to develop their business and prospective client base.” (Dkt. #78, pp. 2, n.6, 7-8.)

¹¹ Exh. #17, pp. 156-58.

¹² Dkt. #78, p. 4.

¹³ Exh. #3, p. 112; Exh. 17, p. 99.

¹⁴ See, Agdipa v. Grant Joint Union High School Dist., 2007 WL 1106099 (E.D. Cal. 2007); Beauperthuy, 2007 WL 707475 (N.D. Cal. 2007); Prentice v. Fund for Public Interest Research, Inc., 2007 WL 2729187 (N.D. Cal. 2007); Stanfield, et al. v. First NLC Financial, Case No. 4:06-cv-03892-SBA, Dkt. #110 (N.D. Cal. 2006); Gerlach, 2006 WL 824652 (N.D. Cal. 2006); Rees, 2006 WL 738987 (E.D. Cal. 2006); Leuthold v. Destination America, Inc., 224 F.R.D. 462, 466-467 (N.D. Cal. 2004).

1 apply” to this motion.¹⁵ Defendants cite a number of cases decided under the stricter
 2 second stage analysis.¹⁶ Second, Defendants cite to “off-the-clock” cases in which the
 3 employees were properly classified as hourly, but some claimed they were denied some
 4 or all of their overtime pay.¹⁷ Third, Defendant cite a number of cases where the class
 5 of employees for whom plaintiffs were seeking conditional certification was too broad
 6 or varied with respect to job title, job duties, divisions, and even companies.¹⁸ All of
 7 these cases are distinguishable from this first-stage case in which the plaintiffs’ class
 8 represents one job that was misclassified as part of a nationwide policy.

10 Finally, Defendants cite a number of cases for which conditional certification
 11 was denied because the plaintiffs did not provide sufficient information for the court to
 12 conclude the class was “similarly situated.”¹⁹ Unlike these cases, Plaintiffs have
 13 presented evidence from: 1) 17 declarants who worked in four states and at
 14 approximately 29 of Defendants’ branch offices; 2) testimony from Defendants’ Rule
 15 30(b)(6) corporate designees and Senior Vice President of Human Resources; and 3)
 16 documents produced in discovery. The evidence in the cases cited by Defendants pale
 17 in comparison to these admissions, documents, and declaratory evidence.

19 **C. Plaintiffs’ Informal Efforts to Contact Similarly Situated Employees
 20 Are Not Relevant to This Motion.**

21 An advertisement letter sent to potential collective class members is

22 ¹⁵ (Dkt. 78, p. 10, n. 18.)

23 ¹⁶ Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497-98 (D. N.J. 2002); Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265, 1274 (M.D. Ala. 2004); Brooks v. BellSouth Telecomm., Inc., 164 F.R.D. 561, 568 (N.D. Ala. 1995).

24 ¹⁷ England v. New Century Fin. Corp., 370 F.Supp.2d 504, 508 (M.D. La. 2005); Flores v. Lifeway Foods, Inc., 289 F. Supp. 2d 1042, 1046 (N.D. Ill. 2003); Sheffield v. Orius Corp., 211 F.R.D. 411, 412 (D. Or. 2002); Diaz v. Electronics Boutique of Am., Inc., 2005 WL 2654270 at * 2 (W.D.N.Y. 2005).

25 ¹⁸ Aguirre v. SBC Comm., Inc., 2006 WL 964554 at * 6 (S.D. Tex. 2006); Diaz, 2005 WL 2654270 at *3; Clausman v. Nortel Networks, Inc., 2003 WL 21314065 at *5 (S.D. Ind. 2003); Sheffield, 211 F.R.D. at 413; Morisky, 111 F. Supp. 2d at 498; Brooks, 164 F.R.D. at 569.

26 ¹⁹ Aguirre, 2006 WL 964554 at * 6 (no affidavits or other factual support); Flores, 289 F. Supp. 2d at 1046 (two affidavits); Mike v. Safeco Ins. Co., 274 F. Supp. 2d 216, 221 (D. Conn. 2003) (one affidavit); Briggs v. U.S., 54 Fed. Cl. 205, 207 (Fed. Cl. Ct. 2002) (one affidavit from plaintiffs’ attorney).

1 fundamentally different than an official judicial notice. **Hoffmann-La Rouche Inc. v.**
 2 **Sperling**, 493 U.S. 165, 174 (1989). (“Court intervention in the notice process for case
 3 management purposes is distinguishable in form and function from the solicitation of
 4 claims.”) **See also Kalish v. High Tech Institute, Inc.**, 2005 WL 1073645, *4 (D.
 5 Minn. 2005) (advertisement letter sent to prospective class members did not qualify as a
 6 “notice”). The purpose of Court authorized notice, on the other hand, is to provide
 7 “timely, accurate, and informative” notice to the potential class so that “they can make
 8 informed decisions about whether to participate” and to further the goal of judicial
 9 efficiency by avoiding numerous duplicative suits and establishing a timetable for the
 10 disposition of the action.²⁰ **Hoffman-La Rouche**, 493 U.S. at 170, 172. On the other
 11 hand, plaintiffs’ counsel has a responsibility²¹ to contact potential class members prior to
 12 bringing a motion for conditional certification and notice to determine whether a
 13 “similarly situated” group of employees exists nationwide. **See, Stanfield v. First NLC**,
 14 No. 06-3892 (SBA/JL), slip op. at *5 (Oct. 30, 2006, N.D. Cal.) (plaintiffs' counsel must
 15 “spread the word” about the potential class action to fulfill their job and serve their
 16 clients).

17 Here, Defendants ignore this obvious distinction, arguing that the letter Plaintiffs
 18 sent to the potential class should suffice. (Dkt. #78, pp. 18-19.) Plaintiffs’ counsel sent
 19 out one “advertisement” letter to each person on the list produced by Defendants,²²
 20

21 Also, if judicial notice is distributed to putative class members at an early stage of the proceedings, there
 22 will be fewer disputes over the notice’s content and the validity of notices from opt-in Plaintiffs received
 23 prior to judicial notice. **Id.** at 170 (the parties dispute over letters sent by Plaintiffs prior to receiving
 24 judicial notice “illustrate the propriety, if not the necessity, for court intervention in the notice process”).

25 Attorney advertisements are also constitutionally protected form of free speech. **Shapero v. Kentucky**
 26 **Bar Ass’n**, 486 U.S. 466, 472 (1988).

27 Defendants produced the list of loan officers only after Plaintiffs brought a motion to compel. In the
 28 motion, Plaintiffs specifically informed the Court that they intended to use the list to obtain information
 29 from these persons to litigate the case, and that they would strictly follow the rules of professional conduct
 30 in doing so. (Dkt. #34, pp. 10-11.)

1 following the specific ethics rules for each state.²³ (Lukas Dec. at ¶2.) It is from this
 2 effort that Plaintiffs were able to obtain a number of the declarations submitted in support
 3 of the motion. (*Id.*)

4 Such an exercise is far different than notice approved by the Court, and there is
 5 no reason to preclude judicial notice due to Plaintiffs' prior solicitation. See, Hoffman
 6 La-Roach, 493 U.S. at 168 (allowing court to initiate judicial notice procedure after
 7 Plaintiffs had already sent 600 letters to potential class members); Stanfield,²⁴ 2006 WL
 8 3190527 at *2 (permitting judicial notice to proceed after Plaintiffs had already contacted
 9 putative class members); Kalish, 2005 WL 1073645, at *4 (granting judicial notice after
 10 plaintiffs had sent potential class members an advertisement letter).

12

13 **III. SUMMARY JUDGMENT SHOULD BE GRANTED ON DEFENDANT'S**
ADMINISTRATIVE, HIGHLY COMPENSATED, AND RETAIL SALES
AFFIRMATIVE DEFENSES.

15 Defendants properly concede summary judgment on the "executive" and
 16 "professional" exemption defenses. (Dkt. #87, p. 24, n.27.) Based on the record before
 17 this Court, Defendants should have extended this concession to include the
 18 administrative, highly compensated, and retail sales defenses.

19

20 **A. Defendants' Admission That Loan Officers' Primary Duty Is "Sales"**
Is Fatal to Their "Administrative" Exemption Defense.

21 The Department of Labor regulations and opinion letters cited by Defendants in
 22 support of their administrative exemption defense definitively state that the
 23 administrative exemption defense does not apply if the "financial services" employee's
 24 primary duty is sales. 29 C.F.R. 203(b) ("an employee whose primary duty is selling
 25 financial products does not qualify for the administrative exemption); DOL 9-8-06 Letter

27 ²³ Generally, this included a bold and capitalized notice on the envelope and/or in the letter declaring it an
 28 "ADVERTISEMENT" or "ADVERTISING MATERIAL." (Lukas Dec. at ¶2.)

²⁴ Attached as Exh. #23.

(Dkt. #79-4, p. 11, n. 2) (“Of course if, based on all the facts in a particular case, a mortgage loan officer’s primarily duty is selling mortgage loans, the mortgage loan officer will not qualify for the administrative exemption.”)

As pointed out in Plaintiffs’ initial memorandum, Defendants have repeatedly admitted that the loan officers’ primary duty is “sales.”²⁵ (Dkt. #71, pp. 22-23.) Defendants do not rebut this fact in their memorandum. In fact, Defendants do not even mention this uncontested fact in making their half-hearted claim that the administrative exemption defense should survive summary judgment. As such, Plaintiffs’ motion should be granted as to this affirmative defense.

B. Defendants Have No Basis for the “Highly Compensated Employee” Exemption Defense.

The “highly compensated employee” exemption defense applies to employees earning at least \$100,000.00, “if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.” 29 C.F.R. 541.601(a). Defendants have conceded that the “executive” and “professional” exemptions do not apply, and as discussed above, the loan officer position cannot meet the “job duties” test under the “administrative” exemption either. See, 29 C.F.R. 541.203(b). As a result, even if some of the Plaintiffs earned at least \$100,000.00,²⁶ this exemption does not apply as a matter of law.

²⁵ Defendants repeat this admission by continuing to argue that the “outside sales” exemption – an affirmative defense that requires “sales” as the employees’ primary duty – applies in this case. See, 29 C.F.R. § 541.500.

²⁶ Plaintiffs doubt “many loan officers earn in excess of \$100,000 annually” as Defendants claim. (Dkt. #78, p. 25.) Indeed, of the four declarations Defendant cites in support of this contention, three state the contrary. Two are from regional managers who testify to only one such loan officer in each of their regions. (Needham Decl. ¶17; Young Decl. ¶18.) The third is from a regional manager who states that the average loan officer income in his region is between \$35,000 and \$65,000. (Kelter Decl. ¶17.) However, Defendants’ failure to produce any payroll documents or other tangible evidence necessary to meet their affirmative burden of proving such high income is moot because the exemption does not apply.

1 **C. As Lenders, Defendants Do Not Qualify For the Section 7(i) "Retail
2 Sales" Defense As a Matter of Law.**

3 Defendants cite only Gatto v. Mortgage Specialists of Ill., Inc., 442 F. Supp. 2d
4 529, 541-42 (N.D. Ill. 2006), in support of their claim to the "retail sales" exemption.²⁷
5 Unfortunately for Defendants, the Gatto court ruled contrary to the Mitchell v.
6 Kentucky Finance Co., 359 U.S. 290, 291 (1959) line of cases only because the
7 defendant was exclusively a broker, and not a lender of loans. Gatto, 442 F. Supp. 2d at
8 539. Even in a case where the defendant is found to be primarily a broker, the court has
9 distinguished and rejected Gatto because the defendant also engaged in "a small amount
10 of direct lending." Saunders v. Ace Mortgage Funding, Inc., 2007 WL 1190985, *6
11 (April 16, 2007, D. Minn.). Indeed, Gatto stands alone under a very limited set
12 circumstances, while all courts who have addressed the issue have predictably followed
13 the Supreme Court and Department of Labor in finding lenders to be ineligible for the
14 retail sales defense. See, Mitchell, 359 U.S. at 291; 29 C.F.R. §779.317 (including
15 "banks," "credit companies, including small loan and personal loan companies," and
16 "finance companies" on list of establishments lacking the requisite "retail concept");
17 Barnett v. Washington Mutual Bank, FA, et al., 2004 WL 1753400, *3, (N.D. Cal.);
18 Saunders, 2007 WL 1190985, *6; Pontius v. Delta Financial Corp., 2007 WL
19 1496692, *4-6 (March 20, 2007, W.D. Pa.); Casas v. Conseco Finance Corp., 2002
20 WL 507059 (D. Minn.). Here, it is uncontested that Defendants were lenders, not
21 brokers. As such, Plaintiffs' motion for summary judgment on this defense should be
22 granted as well.

23 **IV. SUMMARY JUDGMENT SHOULD BE GRANTED ON DEFENDANT**

24
25
26
27 ²⁷ In a very recent case, a Arizona Federal District Court Judge rejected Gatto, questioning whether it
28 could withstand scrutiny under 9th Circuit case law. Partida v. American Student Loan Corp., No. 07-
0674 (PHX/DGC), slip op. at *5 (D. AZ, Jan. 18, 2008)(attached as Exh. 24).

1 **HSBC BANKS STATUS AS A FLSA EMPLOYER.**

2 Defendants' opposition argues that disputed facts exist as to Defendant HSBC
 3 Bank, USA, NA's ("HSBC Bank's") status as an FLSA "employer." (See, e.g., Dkt. #78
 4 p. 23, n. 26.) However, Defendants' Rule 30(b)(6) and human resource personnel
 5 witnesses establish unequivocally that HSBC Bank meets all of the criteria under the
 6 uniquely broad definition of "employer" under the FLSA. These witnesses establishe
 7 beyond dispute that HSBC Bank is an FLSA "employer" of the Plaintiffs. (See, Dkt. #
 8 71, pp. 3-5, 17-20). In fact, the interrelation between the Bank and HSBC Mortgage
 9 Corp.'s ("HSBC Mortgage") operations is so well established, Defendants' Rule 30(b)(6)
 10 deponent agrees that HSBC Mortgage is the "mortgage department" for HSBC Bank, and
 11 the Human Resource Director described HSBC Mortgage as HSBC Bank's "mortgage
 12 division." (Exh. #22, pp. 15-16; Exh. #17, pp. 22-23).

13
 14 Many of Defendants' assertions in opposition to the motion are utterly contrary to
 15 the evidence presented through this testimony from their own witnesses.²⁸ Indeed, even
 16 in their attempt to downplay the role HSBC Bank plays in its subsidiary's operation,
 17 Defendants make additional helpful admissions, such as Mr. Gates admitting in his
 18 declaration that HSBC Bank provides "general oversight of [HSBC Mortgage]'s
 19 financial management." (Dkt. #81, p. 3, ¶10.)

20
 21
 22

 23 ²⁸ See, e.g., Defendant's assertion that each company pays employees separately and each company
 24 maintains and runs a separate payroll operation (Dkt. #78, p. 21), which is contradicted by, e.g., Exh. #22,
 25 p. 50. See also, e.g., Defendant's contention that the marketing efforts of the two corporations are not
 26 coordinated (Dkt. #78, p. 21), which is expressly contradicted by, e.g., Exh. #22, pp. 80-82, and Dkt. #78,
 27 p. 23: "here, HBUS exercises no such managerial control;" "HBUS possesses no substantial control over
 28 the mode and manner of Plaintiffs' work;" Dkt. #78, p. 24, citing "HBUS' marginal involvement in
 HMCU's activities." However, Defendants' conclusory representations do nothing to create a question of
 material fact. See, e.g., Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir.1998)
 ("[T]he nonmoving party may not rest upon the mere allegations or denials of its pleading, and
 unsubstantiated or conclusory assertions that a fact issue exists will not suffice."); Dalton v. Logan Mfg.
Corp., 42 F.3d 1399, *2 (9th Cir. 1994) (unpublished) ("There is a distinction between viewing the
 evidence in the light most favorable to the nonmoving party and making assumptions on entirely
 unsubstantiated speculation.").

1 **A. HSBC Bank Is Intimately Involved in Mortgage Corp.'s Personnel
2 Activities.**

3 Of particular significance is the fact that HSBC Bank is involved in HSBC
4 Mortgage's personnel actions. (See, Dkt. #78, p. 22, citing Smith, 590 F.Supp. at 1208;
5 Opp. at p. 22, citing Frank v. West, 3 F.3d 1353, 1360 (10th Cir. 1993). The person in
6 charge of HSBC Mortgage's human resource services is a Senior Vice President
7 employed by HSBC Bank, Jennette Jennings. (Exh. #17, pp. 21-22, 24-25.) The depth
8 of HSCB Bank's involvement in personnel decisions includes mandatory participation in
9 every termination decision at HSBC Mortgage, as confirmed by Ms. Jennings:

10 [If] anything is going in writing, such as a written warning or a final
11 written warning or even a termination, it must go through [the Bank] first.
12 We must review that document. We confirm the facts and advise if they
13 have enough and what the risks are if there are any.

14 (Exh. #17, p. 169).²⁹

15 **B. HSBC Bank and HSBC Mortgage Share Offices, Employees and
16 Other Resources.**

17 Defendants' opposition also emphasizes the importance to the "centralized
18 control" analysis of "[s]hared services, equipment, employees and office space." (Dkt.
19 #78, p. 20, citing EEOC v. Financial Assurance, Inc., 624 F.Supp. 686, 689-90
20 (W.D.Mo. 1985)). Plaintiffs established the sharing of employees in marketing, human
21 resources, payroll, legal, and upper management of HSBC Bank and HSBC Mortgage in
22 the original memorandum.³⁰ (See supra. See also Dkt. #71, pp. 2-3; Exh. #17, pp. 28-31,

24 ²⁹See also, id. pp. 170, 175 ("[We at the Bank] would determine whether that individual was terminated or
25 not.") and (the Bank's involvement in Chaussy's termination contained "the same discussions I would have
26 with anyone else [at the Mortgage Corporation] who's coming to me [suggesting] that an employee may be
terminated").

27 ³⁰For example, the head of the HSBC Mortgage has the title Executive Vice President and is accountable
28 to HSBC Bank, managers, and the HSBC Mortgage's human resources staff are HSBC Bank employees.
Id. HSBC Bank employees take mortgage applications for HSBC Mortgage. (Exh. #21, pp. 101-103.)
HSBC Bank provides all training from its Buffalo offices for HSBC Mortgage's new, incoming loan
officers. (Exh. 17, pp. 46-47.)

1 184-188; Exh #21, pp. 77-79.) Likewise, uncontroverted evidence demonstrates that
 2 because HSBC Mortgage does not have branches apart from HSBC Bank branches, many
 3 HSBC Mortgage employees typically work from HSBC Bank branch offices, employing
 4 the Bank's equipment and the Bank's services.³¹ (See, e.g., Exh. #22, pp. 27, 33-34; Dkt.
 5 #72-2, pp. 42-26.)

7 As Plaintiffs' Motion establishes, no reasonable fact-finder could find that
 8 Defendants HSBC Bank, and its mortgage department –HSBC Mortgage – are arm's
 9 length transactors,³² when the former is, among other things, involved in every major
 10 personnel decision of the latter and administers all of the latter's human resource
 11 functions. The true nature of the interrelations of these two companies is best stated by
 12 Ms. Jennings when describing why all HSBC Mortgage loan officers are flown to HSBC
 13 Bank's headquarters in Buffalo, New York, for a mandatory full-day orientation:

15 The hires attend a one-day full new hire orientation. And, for the loan
 16 officers, as an example, they all attend that at the bank, at our headquarters
 17 . . . so that they get a true culturation of not only the mortgage corporation
 but, also, the bank and something – they're part of something much bigger
 than just the mortgage corporation.

18 (Exh. #17, p. 45-46.)

19 **V. CONCLUSION**

20 For all of these reasons, and those stated in Plaintiffs' initial memorandum, the
 21 Motions should be GRANTED.

23 ³¹ Payments to the Mortgage Corporation are made employing the Bank's services, while the Mortgage
 Corporation provides products and services for HSBC Bank USA's customers. *Id.*

24 ³² Contrary to Defendants' argument, the relevant holding of **Bowoto v. Chevron Texaco Corp.**, 312
 F.Supp.2d 1229, 1234-1236 (N.D. Cal. 2004) is that Courts "disregard the corporate form where such
 25 disregard is necessary to prevent injustice to a person or entity that would be harmed by refusing to impose
 liability on the basis of the corporate structure." *Id.* at 1235. The integrated enterprise theory is applied in
 26 the context of employment litigation, and that under this test, "courts have applied a far less stringent
 standard to the question of whether related employers can be held liable for one another's actions" and the
 27 "policy underlying the single employer doctrine [also referred to as the integrated enterprise theory] is the
 fairness of imposing liability for labor infractions **where two nominally independent entities do not act
 under an arm's length relationship.**" *Id.* at 1237-1238 (emphasis added).

1 Date: January 28, 2008

_____s/Paul J. Lukas

2 **NICHOLS KASTER & ANDERSON, PLLP**

3 Paul J. Lukas, Admitted Pro Hac Vice

4 4600 IDS Center

5 80 South 8th Street

6 Minneapolis, MN 55402

7 Attorneys for Individual and Representative
8 Plaintiffs

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28